REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **FAO (OS) No. 649 OF 2006**

% **Date of Decision** : 12th October, 2007.

M/S.YOG SYSTEMS INDIA LTD. .... Appellant.
Through Mr. P.N. Lekhi, Sr. Advocate with
Mr. P.K. Aggarwal and Ms. Noor Alam, Advocates.

VERSUS

M/S. SU-KAM POWER SYSTEMS LTD. .... Respondent.
Through Mr. Sanjeev Puri, Advocate
for respondent no.1.
Mr. Pankaj Chander for respondent no.2.

CORAM:

HON'BLE DR. JUSTICE MUKUNDAKAM SHARMA, CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in the Digest ?

SANJIV KHANNA, J:

1. The present appeal is directed against the Order dated 29th August, 2006 passed by the learned Single Judge restraining the

appellant-M/s. Yog Systems India Limited from encashing the bank guarantee and confirming ex-parte ad-interim injunction dated 6th July, 2006 till disposal of the suit. The said suit has been filed by the respondent-M/s.Su-Kam Power Systems Limited. Learned Single Judge accepted the case of the respondent that the appellant had played *fraud* inasmuch as he had attempted to invoke the bank guarantee on a false pretext without supplying the goods.

2. On 26th May, 2006, the appellant had sent quotation to the respondent for supply of 5000 transformers. The quotation records that the supply would be made on Free on Board basis at Baddi, Himachal Pradesh within one week from the date of the purchase order. The place of delivery mentioned in the purchase order was Baddi, Himachal Pradesh, where the factory of the respondent is located. It is further stated in the quotation that local transport at Baddi, Himachal Pradesh would be on buyer's account. The quotation required that payment for the material shall be made within 7 days and secured against a bank guarantee.

3. Thereafter, a purchase order dated 26th May, 2006 was

placed on the appellant by the respondent for supply of 5000 transformers on various dates stipulated therein. The supply order specifically mentions that the delivery was to be made at Baddi, Himachal Pradesh and mode and time of payment was stipulated as against delivery. The total value of the supply order was Rs.57,20,000/-. There is also another Purchase Order dated 26th May, 2006 for the same number of transformers i.e. 5000 pieces, for the same value. The said Purchase Order, however, in supplier's reference refers to Rev-01 dated 12th June, 2006. As per the said Purchase Order delivery was to be made at Baddi, Himachal Pradesh and the mode and terms of payment as stipulated required payment within ten days from the date of lorry receipt.

4. A bank guarantee dated 26th May, 2006 for Rs.60,00,000/- was issued by Standard Chartered Bank at the request of the respondent in favour of the appellant. The said bank agreed to pay to the appellant in case of default, refusal, denial, disputes raised due to failure of the buyer to make the payment as per agreed terms. The relevant recital in the bank guarantee reads as under:-

"WHEREAS M/s Yog Systems India Ltd. having its Registered office at DELHI at 4A, Ramchandra Lane, Civil Lines, Delhi – 110054 hereinafter for the sake of brevity referred to as "the SELLER" (which expressions shall include its successors in interest and assigns) AND M/s Su-Kam Power Systems Ltd., a public Limited Company and having its Registered Office at WZ-1401/2, Nangal Raya, New Delhi-110046 and Corporate Office of Business at Plot No.196-C, Udyog Vihar Ph-VI, Sector-37, Gurgaon hereinafter for the sake of brevity referred to as "the Buyer" (which expressions shall include all its existing Partners/Directors and there respective successors in interest and heirs and executors as the case may be) have agreed to trade transformer worth Rs.60,00,000/- (Rs.Sixty Lakhs over a period of time in staggered delivery schedule for which necessary Purchase Orders will be placed on the Seller from time to time, the Seller is agreeable to accept Bank Guarantee for Rs.60,00,000/- (Rupees Sixty Lakhs Only) as security for the Buyer's obligation to make the payments as per the agreed terms and at the request of the Buyer we **Standard Chartered Bank**, H-2, Connaught Place, New Delhi-110001 (hereinafter referred to as "THE BANK") have agreed to issue a guarantee in favour of the Seller."

5. It is the case of the appellant that on 12th June, 2006 , 600

pieces of transformers for value of Rs. 7,13,856/- were dispatched to the respondent for delivery at Baddi, Himachal Pradesh. Invoice dated 12th June 2006 was issued and terms of delivery was stated as direct. These goods were dispatched through Jai Kisan Tempo Transport Association. A lorry receipt (GR) consignment note dated 12th June, 2006 was also executed and has been enclosed by the appellant in the present Appeal.

6. The appellant raised a Bill of Exchange of Rs. 7,13,856/- being the value of the goods stating, inter alia, that the said amount was payable by the respondent within ten days from the date of the lorry receipt i.e. 22nd June, 2006. It was requested that the said payment be made by the respondent in the name of Canara Bank, the designated bankers of the appellant-M/s. Yog Systems India Ltd.

7. On 22nd June, 2006, the respondent replied to Canara Bank stating that they cannot accept the Bill of Exchange as the material had not been supplied and it appears that the said Bill of Exchange had been issued erroneously. Another letter with similar averments was issued on 23rd June, 2006. In this letter it was also stated that the

respondent had investigated into the matter and the transporter had confirmed that the material was lying with them due to breakdown of the vehicle. The bank was asked to submit the documents after the goods were received and accepted.

8. Canara Bank vide letter dated 24th June, 2006 informed the respondent that payment in terms of the Bill of Exchange was due and, therefore, should be made.

9. It may be stated here that on 20th June,2006 the appellant had made supply of 382 transformers, for which payment was made by the respondent.

10. On 5th July, 2006 the appellant invoked the bank guarantee and asked the Standard Chartered Bank to make payment of Rs.60,00,000/-.

11. On 7th July, 2006, the respondent protested pointing out the correspondence that was exchanged between the parties and claimed that the bank guarantee had been fraudulently invoked and stated that the Purchase Order stood cancelled with effect from 24th June, 2006. It was reiterated that the material had not been received

and, therefore, the payment was not due.

12. Before the bank paid any amount the respondent filed a civil suit being CS(OS) No.1368/2006 against the appellant and the Standard Chartered Bank along with an application for interim injunction. By an ex-parte Order dated 6th July, 2006, a restraint order was passed against the appellant and the respondent-Bank from encashing the bank guarantee. The appellant appeared in the suit and filed it's written statement and reply to the application for interim injunction.

13. On 4th August, 2006, the Court recorded the statements of Mr. Parakh Gupta, Director of the appellant and one Mr.Bir Singh, sole proprietor of Jai Kisan Tempo Transport Association, who had issued the lorry receipt. The statements are relevant for deciding the present Appeal and are reproduced below :-

> "**STATEMENT OF SHRI BIR SINGH , S/O SHRI MANGE RAM, R/O J-164, SECTOR-41, NOIDA (U.P.) ON S.A.**
> **CS (OS) No. 1368/2001**
>
> I am the sole proprietor of Jai Kisan Tempo Transport Association. Ex.P-1 was faxed by my

employee Rajesh to SuKam Power Systems Ltd. The fax was transmitted from a PCO nearby my office at Hosiery Complex, NOIDA. The fax message was sent because some information was sought by Su-Kam company. One Mr. Sabharwal had rung up from Su-Kam company. The goods entrusted to us by Yog Systems India Ltd., reference whereof has been made in Ex.P-1, are lying at Karnal. We had informed the defendant that the consignment is lying at Karnal. Information to this effect was given by us to the defendant on or about 24.6.2006. Defendant has told me to keep the goods at Karnal till further instructions."

"STATEMENT OF SHRI PARAKH GUPTA, S/SHRI Y.K. GUPTA, R/O 4, RAMCHANDRA LANE, CIVIL LINES, DELHI ON S.A.

I am a director on the Board of defendant No. 1. I have brought along with me in court today Shri Bir Singh who is known to me and I identify him. Ex.P-1 was not faxed by us to the plaintiff. I had seen Ex.P-1 for the first time on 23.6.2006 in the office of the plaintiff at Guargaon as I had gone there in connection with the purchase orders and the payment. I had asked Jai Kisan Tempo Transport Assn. as to why goods in question entrusted to it as a carrier were not delivered. Mr. Bir Singh told me that the tempo carrying the goods had broken down. Letter Ex.P-2 was received by me personally.

Q. In what context plaintiff wrote letter Ex.P-2?

Ans. Su-Kam wanted the bills to be submitted

> again for payment. At my asking Ex.P-2 was written by the plaintiff to my banker.
>
> It is correct that the written statement filed by defendant No. 1 has been verified on 22.7.2006. I have signed and verified the written statement.
>
> Q. You have just admitted that on 23.6.2006 it came to your knowledge that the carrier to whom you entrusted the goods for delivery to the plaintiff did not deliver the goods to plaintiff and that it came to your knowledge that goods are lying in Karnal. Why have you not disclosed this fact in the written statement and what is the basis on which you have pleaded that having supplied 600 transformers became due and payable on 22.6.2006. What do you have to say in respect of your pleadings mark 'A' to 'A' in para II of the preliminary objections.
>
> Ans. I have no explanation to furnish".

14. Mr. Parakh Gupta admitted in his statement that on 23rd June, 2006 he came to know that the goods given to Jai Kisan Tempo Transport Association had not been delivered to the respondent and were lying at Karnal. This fact however was not mentioned in the written statement filed by the appellant. On being confronted why this fact had not been mentioned in the written statement, Mr. Parakh Gupta stated that he had no explanation to

give. Mr. Bir Singh in his statement admitted that he had sent fax dated 23rd June, 2006 to the respondent that due to breakdown of the vehicle, goods despatched by the appellant vide receipt dated 12th June, 2006 had to be unloaded. It would take some time to repair the vehicle and therefore the goods had not been delivered for which they were sorry. Mr. Bir Singh also stated that the goods were lying at Karnal. He admitted that similar information was given on the next date i.e. 24th June, 2006 to the appellant. Thus he confirmed the fact that the appellant was aware that the goods had not been delivered to the respondent. However, the last sentence in the statement of Mr. Bir Singh is most crucial. The appellant had directed Mr. Bir Singh to keep the goods at Karnal till further instructions. Thus, it is a clear admission that the appellant had asked the transporter not to deliver the goods to the respondent. Even otherwise it is inconceivable that it would take more than 10 days to repair a vehicle and the transporter would not have informed the appellant. It is also difficult to conceive that the transporter could not have made alternative arrangements for delivery. Prima facie, the goods were deliberately

not delivered to the respondent and this was at the behest and on instructions of the appellant.

15. The statements made by the Director of the appellant and Mr. Bir Singh virtually take out the fire and fundus behind the argument of Mr. P.N. Lekhi, the learned senior counsel for the appellant, relying upon Sections 19, 20, 23 and 39 of the Sale of Goods Act, 1968, on the basis that the contract in question was a FOB contract. It was submitted that in a FOB contract, title in the goods passes on to the buyer (i.e. in the present case to the respondent) once the goods were handed over to the carrier, i.e. Jai Kisan Tempo Transport Association. If this contention of the appellant is to be accepted, then the conduct of the appellant and the direction given by the appellant to Jai Kisan Tempo Transport Association to keep the goods at Karnal till further instructions amounted to misappropriation of goods by the appellant, though title had already passed on to the respondent. It will amount to fraud as understood in law. It is, therefore, apparent and clear that the goods were retained at Karnal and not transported and delivered to the

respondent at Baddi, Himachal Pradesh by the transporter- Jai Kisan Tempo Transport Association, on instructions given by the appellant. Learned Single Judge was therefore right in holding that a prima facie case of fraud had been made out. The plea of the appellant that the goods were appropriated to the account of the respondent, on delivery to the common carrier as the contract was a FOB contract are aspects on which we cannot give any final or conclusive opinion. The said stand of the appellant is contradicted by his conduct and statement of the appellant that the common carrier was asked by the appellant-seller not to deliver the goods to the respondent. The question whether appropriation of goods had taken place depends upon the intention of the parties. When a seller exercises right of disposal or where a seller agrees to deliver goods at their destination, the carrier is the seller's agent and delivery to the carrier is not a final appropriation. (See in this regard observations of the Supreme Court in ***Mahabir Commercial Company Limited versus CID, West Bengal, Calcutta,*** reported in 1972 (2) SCC 704.)

16. Learned Single Judge has quoted para 2 of the preliminary

objections in the written statement filed by the appellant. When the said paragraph is contrasted and compared with the statement made by Mr. Parakh Gupta on oath before the Court, it is apparent that the appellant wanted to conceal facts from the Court and had made wrong averments in the written statement that the goods had been supplied, yet payment was not made justifying invocation of the bank guarantee. The appellant was fully aware that the goods were lying at Karnal and as per the transporter the goods were directed to be kept at Karnal till further instructions from the appellant. The transporter had been asked by the appellant not to supply goods to the respondent.

17. In view of the above prima facie findings, we are not examining the Sections of the Sale of Goods Act, 1968 in detail. We may, however, state that it is the case of the respondent that the contract in question is not a FOB contract. It was argued on behalf of the respondent that the said term finds mention in the quotation but was not mentioned in the Purchase Orders. It was also stated that the place of delivery as specified even in the quotation was Baddi,

Himachal Pradesh and only local transportation was on buyer's account.

18. In the written synopsis filed by the appellant it is admitted that it had asked the transporter to hold the goods at Karnal i.e. at the place of break down of the goods vehicle. Thus, it is admitted in the written submission that the goods vehicle by which 600 transformers were being supplied to the respondent had broken down at Karnal and the goods had not been delivered to the respondent on instructions of the appellant. It is stated that the appellant was justified in instructing the transporter as the respondent had cancelled the contract. The contract was cancelled by the respondent on 24th June,2006 but before the said date 382 transformers were supplied by the appellant and the respondent had made payment. Moreover, the above statement in the written submissions is contrary to the averments and the stand taken in the written statement filed before the learned Single Judge and even the stand taken in the grounds of appeal. In preliminary objection V in the written statement, the appellant has stated as under:-

> "That the Plaintiffs have filed the above suit for mala fide intentions and for ulterior motives in order to avoid the contract and avoid the payment to the Defendant No. 1 in respect of the supplies made by him. A sum of Rs.7,13,856/- had become due to the Defendant No. 1 on 22nd June, 2006. The Plaintiffs have not made any payment whatsoever in respect of the said supply. On the one hand, the Plaintiffs engaged the Defendant No. 1 and its bankers and asked for re-submission of the Bill of Exchange and, on the other hand, on 24th June, 2006, wrongly and illegally sought to revoke the Purchase Order on wholly flimsy grounds."

19. Similarly, in preliminary objection VI it is stated that the respondent herein was not making payment in respect of the supplies already made. The preliminary objection No. VI reads:-

> "Since the Plaintiffs are not making the payment in respect of the supplies already made and also unilaterally revoking the order and are not willing to accept the goods manufactured for them, the Defendant No. 1 has incurred huge loss."

20. In reply to paragraph 11 of the plaint, on merits it is stated that the parties had orally agreed that 600 pieces of transformers would be delivered on 12th June, 2006 itself and the balance 4400

pieces of transformers would be supplied after about a week i.e. from 19th -20th June, 2006 and the entire order would be completed within 4-5 days after 20th June, 2006. It is further stated that these broad oral terms were accepted, but were not reproduced in writing as the parties did not feel the necessity of having a formal agreement.

21. There is no averment in the written statement about break down of vehicle at Karnal and/or any direction by the appellant herein to the transporter not to deliver the goods to the respondent because of cancellation of the contract.

22. In the grounds of appeal, the appellant has distinctly shifted it's stand as statement of the Director of the appellant and the transporter had been recorded before the learned Single Judge. In paragraph 12 of grounds of appeal, it is stated that on 24th June, 2006 the transporter sought to deliver the goods to the respondent No. 1, but the said respondent refused to take/accept delivery on the ground that the purchase order stands cancelled. It is further alleged that thereafter the transporter contacted the appellant for return of goods, who refused to take delivery of the returned goods. Mr. Bir

Singh has not made any such statement nor any such averment has been made in the written statement. The constant shift in the stand taken by the appellant is a pointer towards fraud. The appellant has even tried to conceal facts from the Court and when confronted sought to change and alter its stand but the declension is apparent.

23. Courts normally do not grant injunction against invocation of bank guaranties/letters of credit. A bank guarantee or a letter of credit is regarded as an independent and a separate contract between the bank and the beneficiary and disputes between the two contractual parties in the underlying/principal contract regardless of the merits, cannot be a ground for issue of an injunction order. However, the above general rule is subject to some exceptions. Two well-known exceptions being fraud of egregious nature, which would vitiate the very foundation of the bank guarantee/letter of credit and when a beneficiary seeks to take advantage of his own fraud. The second ground being irretrievable harm or injustice to one of the parties. (Refer recent decision of the Supreme Court in ***Himadri Chemicals Industries Limited versus Coal Tar Refining Company*** , reported

in 2007 (9) Scale 631, wherein earlier case law has been extensively considered and principles have been elucidated).

24. In the present case, we are concerned with the first exception. Fraud can vitiate any contract or even the most solemn proceedings in a civilised society. One who indulges in an act of deceit or trickery, seeks to undermine rule of law in a civilised society. In Webster's New International Dictionary, “fraud” has been defined as an act or omission to act, concealment by which one person obtains advantage over the other. In Black's Legal Dictionary, “fraud” has been defined as intentional perversion of truth for the purpose of inducing another in reliance upon it, to part with valuable thing or surrender a legal right. Fraud may be by words or by conduct or by concealment or by making false or misleading allegations, when such conduct is intended to deceive another person. Bad faith and fraud are synonyms. It includes false statement, suppression of truth etc. with the purpose of deceiving and gaining advantage over another. A false representation or deception to gain unjust advantage, dishonest artifice or trick

amounts to fraud. Section 17 of the Contract Act,1872 defines "fraud"as

> "17. *Fraud defined*. Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract
>
> (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
>
> (2) the active concealment of a fact by one having knowledge or belief of the fact;
>
> (3) a promise made without any intention of performing it;
>
> (4)any other act fitted to deceive;
>
> (5) any such act or omission as the law specially declares to be fraudulent."

25. For grant of temporary injunction, fraud should be of egregious nature, i.e. clear and apparent. The facts stated above

and the conduct of the appellant prima facie establishes fraud of egregious nature. The present case cannot be regarded as one of mere allegation of fraud, but one in which it has been sufficiently established for the purpose of grant of interim injunction. The appellant was aware that the documents had been presented for payment in respect of goods, which had been directed by them to be detained at Karnal till further orders. The appellant seeks to gain advantage of his own wrong. The fact that the goods were detained at Karnal and physical delivery was not made to the respondent, though vaguely denied in the written statement by the appellant, stands admitted in the grounds of appeal and written submissions filed before us and the statement of the transporter and the Director of the appellant recorded before the learned Single Judge.

26. We may refer to the decision of the Court of Appeal in ***Edward Owen Engineering Limited versus Barclays Bank International Limited,*** reported in (1978) 1 All England Law Reports 976. In the said case, reference was made to an earlier decision in the case of ***Sztejn versus J. Henry Schroder Banking Corpn.,***

reported in (1941) 31 NY SUPP 2d 631, wherein the seller had intentionally failed to ship the goods ordered. When the situation and the fraud was brought to court's knowledge/attention, the court granted injunction from encashment of letter of credit to protect the buyer against the unscrupulous seller. In the said case, the English Court held that the bank ought not to pay, when it sees that the documents are forged or request for payment is made fraudulently in the circumstances when there is no right to payment. Bank is entitled to refuse payment if it finds out before payment that the beneficiary has committed a fraud or has acted fraudulently. We have referred to the correspondence between the respondent and the bank. Payment is yet to be made by the bank. The bank is also a party to the proceedings before the learned Single Judge and this Court.

27. In view of the above facts, we do not find any merit in the present appeal and the same is dismissed. It is clarified that the observations and findings in the impugned Order and the present Order are for the purpose of deciding the interim application and the suit will be decided on the basis of evidence led by the parties

without being influenced by the aforesaid observations and findings.

No costs.

(SANJIV KHANNA)
JUDGE

(DR. MUKUNDAKAM SHARMA)
CHIEF JUSTICE

OCTOBER 12, 2007.
P/VKR